Supreme Court, U.S.
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No. 92-982

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH A. MOHWISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction for conducting a continuing criminal enterprise.

2. Whether petitioner had adequate notice that structuring deposits in collusion with a bank official so as to avoid currency transaction reporting requirements was illegal.

3. Whether petitioner's conviction for drug conspiracy, in violation of 21 U.S.C. 846, should be vacated after the affirmance of his conviction for conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B34) is reported at 965 F.2d 1390.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A petition for rehearing was denied on July 6, 1992. Pet. App. C1-C2. On September 24, 1992, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 4, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of engaging in a continuing criminal enterprise (Count 1), in violation of 21 U.S.C. 848; conspiring to distribute cocaine and marijuana (Count 2), in violation of 21 U.S.C. 846; conspiring to file false currency transaction reports (CTRs) and income tax returns, to conduct financial transactions involving proceeds of the sale of controlled substances, and to engage in monetary transactions in criminally derived property, in violation of 18 U.S.C. 371 and 31 U.S.C. 5313, 5322, and 5324(3); 17 counts of failing to file CTRs and aiding and abetting such violations, in violation of 31 U.S.C. 5313 and 5322; and three counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent terms of 20 years' imprisonment for the continuing criminal enterprise and drug conspiracy offenses, and concurrent five- and three-year terms of imprisonment on the other counts. The court of appeals reversed all but one of the substantive CTR convictions, but it affirmed all the other convictions and sentences.

1. The evidence at trial showed that petitioner and co-defendant Bill Patrick[1] operated a cocaine and marijuana drug distribution and money laundering business in the Cincinnati, Ohio, area. Patrick obtained the drugs used in the operation and located

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[1] Patrick's petition for a writ of certiorari, No. 92-324, was denied on October 19, 1992, as was a petition filed by another co-defendant, Delmus G. Gross, No. 92-269. 113 S. Ct. 376.

wholesale and retail customers for them. Petitioner coordinated the drug operation with Patrick and stored cocaine for the operation. Petitioner and co-defendant Delmus Gross used Gross's automobile dealership and several corporations owned by petitioner, including a window manufacturing firm known as Season Sash, to launder the proceeds of the drug business and to conceal its profits. Pet. App. B2.

The money laundering was accomplished in the following manner: petitioner periodically had Season Sash's controller make "interest" payments to Gross, mainly in cash. Gross would deposit those payments into his own account and then return the funds by check to petitioner, Patrick, or one of petitioner's corporations. Pet. App. B4. In order to avoid currency transaction reporting requirements, Gross instructed his bookkeeper to deposit less than $10,000 in cash at a time. *Ibid.*; Gov't C.A. Br. 58. On 15 occasions between June 1983 and March 1985, Gross received large cash payments of between $20,000 and $100,000 from petitioner's companies. On each occasion, he deposited the funds in smaller increments into bank accounts he controlled and then shortly afterwards issued a check to petitioner or to one of his companies for a similar amount. Pet. App. B4-B5; Gov't C.A. Br. 31-34.

In December 1983, Gross asked David Maynard, executive vice-president of Union Bank & Trust Co., to keep a $100,000 cash payment from one of petitioner's companies in the bank's safe over the holidays. Maynard returned the cash to Gross after Christmas, and Gross said he would keep it. Instead, Gross telephoned Maynard and said that he was

sending the cash back, that he wanted it to go to one Eddie Ballard, and that he did not want the transaction to be reported. Maynard then obtained 10 cashier's checks for $9,500 each and one cashier's check in the amount of $5,000, made out as Gross had requested. Maynard did not file any CTRs for that transaction. Pet. App. B7; Gov't C.A. Br. 35.

2.a. The court of appeals rejected petitioner's challenge to his conviction for operating a continuing criminal enterprise, in violation of 21 U.S.C. 848(a). Under that statute, the government was required to prove that petitioner obtained substantial income by engaging in a continuing series of drug violations "in concert with five or more other persons with respect to whom [petitioner] occupie[d] a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. 848(c)(2)(A). The court of appeals held that the evidence was sufficient to prove that petitioner supervised bank vice-president David Maynard as well as co-defendants Bill Patrick and Delmus Gross through petitioner's control over the corporations and supervision of the money laundering, and the court further held that the money laundering scheme was a part of a drug conspiracy. Pet. App. B19-B20. The court held that there was also sufficient evidence that, in "controlling" co-defendant Bill Patrick, petitioner "organized, managed, or supervised" (*id.* at B19) two individuals who were controlled by Bill Patrick—Kenny Patrick (Bill Patrick's son) and Tommy Lancaster. *Id.* at B15-B18. The total of five persons—Maynard, Gross, Bill Patrick, Kenny Patrick, and Lancaster—directly or indirectly supervised by petitioner in connection with

drug violations, was sufficient to sustain petitioner's CCE conviction. *Id.* at B20.

b. Petitioner also challenged the validity of his convictions for violating the Currency Transactions Reporting Act, 31 U.S.C. 5313 and 5322. Federal regulations require financial institutions to file a currency transaction report for each cash transaction of more than $10,000, 31 C.F.R. 103.22(a), and Section 5322 makes it a criminal offense knowingly to violate the regulation. The court of appeals noted that at the time of petitioner's offenses the Act applied to financial institutions only. Pet. App. B4. The court observed that, under the version of the statute in effect at that time, if individuals structured currency transactions so as to prevent a financial institution from becoming aware of its reporting obligation, the financial institution would not violate the reporting requirement of the statute. The court ruled that a customer who structured the transactions in those circumstances could not be held criminally liable, because the principal—the financial institution—would not have committed a crime. *Id.* at B5-B6. As a result, the court reversed all but one of petitioner's convictions for causing a bank to fail to file currency transaction reports. *Id.* at B7. The court found, however, that the evidence on one of the substantive CTR counts showed that Gross gave bank vice-president Maynard a "temporary" deposit of $100,000 cash, and then directed Maynard to obtain cashier's checks for less than $10,000 each and not to file a currency transaction report on the transaction. On that occasion, the court reasoned, the bank had acted knowingly, and petitioner and Gross had aided

and abetted a knowing violation of the CTR filing requirement. Accordingly, the court affirmed petitioner's conviction for that violation. *Id.* at B6-B7.

The court of appeals also affirmed petitioner's convictions for conspiring to violate the currency transaction reporting requirements. The court found that there was abundant evidence of an agreement between petitioner, Gross, and Patrick, and that the money laundering operation was an essential feature of the drug business. Pet. App. B8-B9.

ARGUMENT

1. Petitioner argues (Pet. 12-21) that the court of appeals erred in affirming his CCE conviction because the five persons the court of appeals found to have been supervised by petitioner were not specifically identified to the jury as the relevant supervised persons, nor was the jury specifically instructed respecting the indirect supervisory relationship between petitioner and two of the five, Kenny Patrick and Tommy Lancaster. Petitioner contends that the court of appeals has, in effect, affirmed the conviction on a theory never presented to the jury, and he argues that the affirmance is in conflict with this Court's holding in *McCormick* v. *United States*, 111 S.Ct. 1807, 1815 n.8 (1991).

a. The decision of the court of appeals does not conflict with *McCormick*. In *McCormick*, this Court held that the court of appeals erred when it affirmed a conviction of a state legislator for extortion in violation of the Hobbs Act, 18 U.S.C. 1951, on "legal and factual grounds that were never submitted to the jury." 111 S. Ct. at 1814. The jury had been given specific instructions on how to distinguish between

illegal extortion payments and lawful campaign contributions. The court of appeals did not address the validity of those instructions, but instead developed and applied to the evidence its own test for determining whether a payment qualified as a lawful campaign contribution. *Id.* at 1814-1815. This Court stated that "a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance" and that "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *Id.* at 1815 n.8.

There is no inconsistency between the rule applied in *McCormick* and the basis on which the court of appeals affirmed petitioner's conviction for conducting a continuing criminal enterprise. Count 1 of the indictment alleged that petitioner and co-defendant Patrick engaged in a series of violations of 21 U.S.C. 841 and 846 "in concert with at least five (5) other persons with respect to whom Bill J. Patrick and [petitioner] occupied positions of organizers, supervisors and managers." The identity of the persons supervised by petitioner and the supervisory relationship petitioner held was not specified in the indictment or in the jury instructions, but was left to the jury's evaluation of the evidence presented at trial.[2] The court of appeals relied on two common-

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[2] Petitioner asserts (Pet. 13) that a pretrial brief submitted by the government named a number of individuals whom petitioner supervised, and that that list did not include either co-defendant Bill Patrick or Lancaster. The brief to which petitioner refers did not purport to contain an exhaustive list;

sense inferences in identifying the individuals petitioner supervised. First, the court inferred from petitioner's control of the finances of the drug transactions and receipt of the largest share of the proceeds of those transactions that he organized, supervised, or managed other individuals—like Bill Patrick—who participated in the narcotics conspiracy with him. Second, the court inferred that petitioner's organization, supervision, and management of Patrick gave him similar control over those whom Patrick in turn organized, supervised, and managed. Nothing in the jury instructions precluded the jury from drawing similar inferences, and nothing in the court of appeals' opinion suggested that the jury instructions were inaccurate or had to be qualified in any way. Thus, unlike in *McCormick*, the court of appeals affirmed the conviction on a legal and factual theory that was submitted to the jury.

b. Petitioner argues that the decision of the court of appeals conflicts with the Third Circuit's decision in *United States* v. *Rosa*, 891 F.2d 1063, 1065-1067 (3d Cir. 1989). In *Rosa*, the Third Circuit held that "[i]n the absence of important countervailing concerns, * * * the [CCE] defendant should be advised prior to trial of the individuals claimed by the government to be controlled persons." *Id.* at 1066.

In the court of appeals, petitioner did not advance his claim that the district court erred in failing to supply him with a bill of particulars that included a complete list of individuals he was alleged to have

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it merely stated that petitioner directed "numerous individuals * * * including" several specifically identified individuals, "among others." *Ibid.*

supervised, and the court of appeals did not rule on any such claim. There is thus no split in the circuits, and further review to consider a claim that the court of appeals did not pass upon would be unwarranted.

In any event, petitioner could derive no comfort from the Third Circuit's decision in *Rosa*. In *Rosa*, the Third Circuit refused to reverse the defendant's conviction despite the fact that a bill of particulars identifying each individual supervised by the defendant had not been provided. The court held that "a defendant cannot successfully attack the denial of a bill of particulars unless he demonstrates both that the trial court abused its discretion in denying relief *and that surprise or other prejudice resulted from his having been deprived of the requested information* at the pre-trial stage." 891 F.2d at 1067 (emphasis added). Because the defendant in *Rosa* "failed to show or, indeed, to claim a specific surprise or other prejudice" that he suffered from the failure to supply him with an exhaustive bill of particulars naming all of the individuals whom he supervised, the court of appeals affirmed his conviction. *Ibid.* Similarly, petitioner failed in the court of appeals in this case to allege any surprise or prejudice, and even in his petition he does not identify any specific prejudice he suffered as a result of the failure to supply him with an exhaustive bill of particulars on this point.[3] Accordingly, application of the standards articulated

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[3] Petitioner's defense at trial was that he was not involved in a drug conspiracy at all, and in closing argument he never mentioned the five-person requirement or argued to the jury that the prosecution's evidence failed to establish that he supervised five persons. See 18 Tr. 90-125.

in *Rosa* would result in an affirmance of petitioner's conviction.

2. Petitioner also argues (Pet. 22-26) that his conviction for aiding and abetting a violation of the currency transaction reporting requirements violated his right to due process because he did not have fair warning of the criminal nature of his conduct. Petitioner asserts that there is a conflict in the circuits concerning whether, prior to the enactment of Section 5324(3), an individual could be convicted of aiding and abetting a violation of 31 U.S.C. 5313 and 5322 for causing a bank to fail to file a CTR. As we argued in our opposition to the petitions of co-defendants Gross and Patrick, which this Court denied on October 19, 1992 (Nos. 92-269 and 92-324), further review of this issue is unwarranted.

Under 31 U.S.C. 5313, the Secretary of the Treasury has the authority to promulgate regulations requiring participants in a cash transaction with domestic financial institutions to file a report of the transaction. Pursuant to that authority, the Secretary has promulgated regulations requiring financial institutions to file CTRs whenever a customer engages in a cash transaction of more than $10,000. See 31 C.F.R. 103.21-103.29. The regulations do not, however, impose on the customer an obligation to file a CTR.

A number of courts have held that, in light of the failure of the regulations to impose any duty directly on the customer, 18 U.S.C. 2(b) does not impose accessory liability on a customer who structures a transaction to keep the financial institution from learning that the transaction involves more than

$10,000 (and thereby prevents the bank from knowingly violating the CTR statute). See, *e.g.*, *United States* v. *Mastronardo*, 849 F.2d 799 (3d Cir. 1988); *United States* v. *Anzalone*, 766 F.2d 676, 681-682 (1st Cir. 1985); *United States* v. *Larson*, 796 F.2d 244, 247 (8th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758, 762 (9th Cir. 1986). Other courts, however, have held that an individual who structures a cash transaction to keep a financial institution from learning that the CTR requirements are triggered has caused the institution to fail to file the CTR, and thus is liable under the ordinary interpretation of 18 U.S.C. 2(b). See, *e.g.*, *United States* v. *Heyman*, 794 F.2d 788 (2d Cir. 1986), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Meros*, 866 F.2d 1304 (11th Cir. 1989); *United States* v. *Giancola*, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018 (1986); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983).

In a portion of its decision not at issue in this petition, the court of appeals reversed all but one of petitioner's convictions for substantive CTR violations. In reversing those convictions, the court of appeals essentially agreed with petitioner and with the line of authority represented by *Mastronardo*, *Anzalone*, *Larson*, and *Varbel* that, prior to the enactment of Section 5324(3), it was not a crime for an individual to structure cash deposits if the effect of doing so was to keep the bank from learning that the CTR reporting requirement was triggered.

The court of appeals' affirmance of petitioner's conviction on the single remaining CTR count,

however, is consistent with both lines of appellate authority. That count arose out of the transaction that took place after Christmas in 1983 in which Gross returned $100,000 in cash to Union Bank & Trust Vice-President Maynard and specifically directed Maynard not to file a CTR. With respect to that transaction, it was clear that the bank had an obligation to file a CTR and failed to do so, since its officer was aware of the fact that the transaction involved more than $10,000 in cash and yet complied with petitioner's and Gross's scheme. Accordingly, the bank was liable as a principal for its violation of 31 U.S.C. 5313 and 5322, and petitioner was liable as an aider and abetter. His conviction on that count is not called into question by *Mastronardo*, *Anzalone*, *Larson*, or *Varbel*, and there is thus no conflict among the circuits concerning the validity of that conviction.

In any event, the conflict in authority on which petitioner attempts to rely is of no continuing importance. As petitioner notes, Congress has amended the currency transaction reporting statute to render structured transactions illegal, regardless of whether the financial institution itself knowingly violated the statute. See Money Laundering Control Act of 1986, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18 to 3207-39. One of the purposes of the new Act was to overrule the decisions in *Anzalone* and *Varbel*, and to codify the position of the Eleventh Circuit in *Tobon-Builes*. Section 1354 of the Act (100 Stat. 3207-22), entitled "Structuring Transactions to Evade Reporting

Requirements Prohibited," created a new Section 5324 of Title 31, which provides in pertinent part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. The legislative history specifically states that Congress intended to codify the Eleventh Circuit's pre-1986 position, under which petitioner is clearly liable. S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986). Thus, even if this case implicated the conflict in the circuits concerning the pre-1986 currency reporting statute, further review to resolve that conflict would not be warranted.

3. Finally, petitioner argues (Pet. 26-27) that the court of appeals erred by failing to vacate his conviction for drug conspiracy in violation of 21 U.S.C. 846 (Count 2) after affirming his conviction for the CCE offense (Count 1). On appeal, petitioner argued that, under *Jeffers* v. *United States*, 432 U.S. 137, 154-158 (1977), his conviction for drug conspiracy

in violation of 21 U.S.C. 846, on which he had received a sentence concurrent with his sentence for the CCE violation, must be vacated in light of his CCE conviction. The government agreed that upon petitioner's valid CCE conviction, the drug conspiracy conviction should be vacated. Gov't C.A. Br. 46-47. The court of appeals, however, did not address that issue and instead affirmed petitioner's drug conspiracy conviction.

As we explained in our brief in opposition to the petition for certiorari in *Fernandez* v. *United States*, cert. denied, 111 S. Ct. 2249 (1991) (No. 90-7210), Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. See *Garrett* v. *United States*, 471 U.S. 773, 794 (1985); *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977) (plurality opinion). The Sixth Circuit, like a number of other courts of appeals, has determined that a drug conspiracy conviction should thus be vacated when the defendant is also convicted on a CCE count. See *United States* v. *Davis*, 809 F.2d 1194 (6th Cir. 1987); *United States* v. *Schuster*, 769 F.2d 337, 344-345 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986).[4] Ac-

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[4] See also *United States* v. *Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989); *United States* v. *Butler*, 885 F.2d 195, 201-202 (4th Cir. 1989); *United States* v. *Possick*, 849 F.2d 332, 341 (8th Cir. 1988); *United States* v. *Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); *United*

cordingly, although some courts have determined that the conspiracy conviction need not be vacated in those circumstances, at least so long as the defendant is not subjected to any additional punishment as a result of the drug conspiracy conviction,[5] we agreed in the court of appeals that, once petitioner's CCE conviction was affirmed, his drug conspiracy conviction could be vacated even though he received a concurrent sentence on the conspiracy count. See Gov't C.A. Br. 46-47.

The Sixth Circuit did not expressly address petitioner's claim that his drug conspiracy conviction should be vacated, and because that claim was unopposed and was meritorious under Sixth Circuit law, it appears that the Sixth Circuit's affirmance of petitioner's conviction on the conspiracy count was a mere oversight. When petitioner's case is otherwise final in all respects, petitioner may file an appropriate motion in the district court to vacate his sentence on the conspiracy count. In the meantime, petitioner will not be prejudiced by the additional judgment of

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States v. *Dickey*, 736 F.2d 571, 596-597 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); *United States* v. *Jefferson*, 714 F.2d 689, 703 & n.28 (7th Cir. 1983); *United States* v. *Smith*, 703 F.2d 627, 628 (D.C. Cir. 1983); *United States* v. *Webster*, 639 F.2d 174, 182 (4th Cir.), cert. denied, 454 U.S. 857 (1981).

[5] See, *e.g.*, *United States* v. *Fernandez*, 916 F.2d 125 (3d Cir. 1990) (affirming convictions for drug conspiracy and CCE); *United States* v. *Bond*, 847 F.2d 1233, 1238-1239 (7th Cir. 1988) (permitting concurrent sentences to be imposed for drug conspiracy and CCE); *United States* v. *Aiello*, 771 F.2d 621, 632-635 (2d Cir. 1985) (combining drug conspiracy and CCE convictions and imposing a single sentence for both).

conviction on that count, since he will be serving a 20-year, non-parolable term of imprisonment for the CCE offense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993